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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

MARILYN A. WALTZ,

Cross-complainant and
Appellant,

v.

BADGER TECHNOLOGY,

Cross-defendant and
Respondent.

C040832

(Super. Ct. No.
CV9659721)

Marilyn A. Waltz (appellant) appeals from entry of summary judgment in favor of Badger Technology, the successor in interest to First California Capital Markets Group of San Francisco (First California). In a prior unpublished opinion, this court reversed a judgment on the pleadings in favor of First California. (*Waltz v. First California Capital Markets Group of San Francisco* (Dec. 18, 2000, C028566); hereafter *Waltz I.*) On remand, First California successfully moved for summary judgment.

As we will demonstrate, in its motion for summary judgment, First California presented undisputed evidence to establish that many of the material allegations of appellant's complaint are not true. Based on the evidence presented on the motion, we agree with the trial court that First California did not owe a duty to appellant. Accordingly, we shall affirm summary judgment.

BACKGROUND

This litigation arose out of aborted efforts in which a number of developers conceived the idea of engaging in certain joint actions to facilitate development of property in the City of Wheatland. The plan would affect approximately 214 acres of previously undeveloped property.

Appellant owned a parcel of about 52 acres within the area to be developed. In 1989, one of the developers, John Boswell, agreed to purchase appellant's parcel. Boswell made a down payment and gave appellant a promissory note secured by a first deed of trust for the remainder of the purchase price.

In preparation for development, Boswell provided funding for the City of Wheatland to prepare a specific plan for the area. When the specific plan was adopted, it required that certain infrastructure improvements be made before development, including such things as an increase in sewage treatment capacity, traffic improvements, and drainage control.

Boswell and other developers asked the City of Wheatland to use the Mello-Roos Community Facilities Act of 1982 (the Mello-Roos Act) (Gov. Code, § 53311 et seq.) as a means of financing public capital facilities and services to support the planned development.

The Mello-Roos Act was intended to provide local governments with an alternative method of financing public capital facilities and services, especially in developing areas and areas undergoing rehabilitation. (Gov. Code, § 53311.5.) It enables a local government entity to establish a community facilities district as a legally constituted governmental entity for the purpose of financing specific facilities and services. (Gov. Code, § 53317, subd. (b).)

Pursuant to the Mello-Roos Act, in order to finance the acquisition, construction, and provision of facilities and services in the district, the local government entity may, on behalf of the district, levy a special tax on property in the district, incur bonded indebtedness to be repaid through special taxes and charges upon the affected property, and establish or change the appropriations limit of the district, as defined by subdivision (h) of section 8 of article XIII B, of the state Constitution. (Gov. Code, §§ 53325.3, 53325.7, 53345-53351.) These matters require voter approval, with the special taxes and bonded indebtedness requiring a two-thirds majority vote. (Gov. Code, §§ 53325.7, 53326, 53328-53329, 53352-53355.) With respect to territory with fewer than 12 registered voters, and where special taxes will not be imposed on property in residential use at the time of the election, the vote may be by the landowners with the owners given one vote per acre or portion thereof. (Gov. Code, § 53326.)

The City of Wheatland was amenable to using the Mello-Roos Act to finance public improvements necessary to allow development to

go forward. Eventually, the city made a \$2,075,000 bond offering under the Mello-Roos Act.

First California served as underwriter for the bond offering. The bond issue was fully subscribed, and infrastructure improvements necessary for development were completed.

Boswell did not intend to physically develop the property himself. His plan was to proceed to the point that he had an approved subdivision map recorded and then sell the property to another developer. When Boswell had these "paper lots" in place, he began to market the property. Initially he received lucrative offers for the property. However, by all accounts, and as a matter of common knowledge, the California real estate market suffered severe declines in the early 1990's. The offers that Boswell had received were withdrawn, and he found himself unable to sell the property.

Boswell testified it became burdensome for him to attempt to make the payments for taxes and assessments and the installments on appellant's note. Eventually, he made an offer to appellant pursuant to which he would bring the taxes current and then deed the property back to her. He said that if she disagreed, he would continue to try to carry the property. Appellant agreed to take back the property.

When appellant received the property back from Boswell, it was burdened with the obligation of special tax assessments pursuant to the Mello-Roos Act. Under the resolutions adopted by the City of Wheatland and approved by the landowners in the district, annual assessments of up to \$125,020 could be imposed upon appellant's

property. The maximum assessment was imposed in the 1995-1996 tax year.

Appellant failed to pay the assessment. Therefore, the City of Wheatland brought an action to foreclose. Appellant cross-complained. Her claims against the city were resolved in its favor prior to the first appeal and are not at issue here.

Appellant also cross-complained against First California. After the trial court granted judgment on the pleadings, appellant appealed. On appeal, she abandoned all purported theories for relief except a claim for professional negligence and the assertion that she should be allowed to amend to state a claim under the federal Racketeer Influenced and Corrupt Organizations Act, commonly known as RICO. (18 U.S.C. § 1961 et seq.)

This court agreed that appellant could not state a cause of action under RICO, but held that she had sufficiently alleged a cause of action for professional negligence. (*Waltz I, supra*, p. 21.) Applying the standard of review for judgment on the pleadings, i.e., accepting as true all material facts alleged in appellant's complaint (*id.* at pp. 2, 18, fn. 4), the opinion concluded, among other things, the allegations of the complaint were sufficient to establish that First California owed a duty to appellant for purposes of an action for professional negligence. (*Id.* at pp. 10-18.) It noted, however, that the legal question of duty could be "revisited on motion for summary judgment, motion for nonsuit, or in another appropriate manner when evidence is produced to establish what [First California] actually did and did not do

with respect to the application of the Mello-Roos Act to appellant's property." (*Id.* at p. 18, fn. 4.)

After remand to the trial court, First California moved for summary judgment. Based upon the evidentiary development in the papers submitted in support of and opposition to the motion, the trial court determined that First California did not owe a duty to appellant. Thus, the court entered summary judgment in favor of First California. Appellant appeals again.

DISCUSSION

I

Standard of Review and Law of the Case

In reviewing an order granting a motion for summary judgment, we independently review the record to determine whether there are triable issues of material fact. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) In doing so, we view the parties' evidentiary submissions in a light most favorable to appellant as the losing party. (*Id.* at p. 768.) Summary judgment will be upheld when the evidence, viewed in such a light, fails to establish a necessary element of appellant's cause of action or demonstrates that under no hypothesis is there a material issue of fact that requires the process of a trial so that respondent is entitled to judgment as a matter of law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

Thus, our focus shifts from that employed in reviewing a judgment on the pleadings. Summary judgment provides a method by which a court can "determine whether the triable issues apparently raised by [the pleadings] are real or merely the product of adept

pleading.” (*Coyne v. Krempels* (1950) 36 Cal.2d 257, 262.) Hence, on motion for summary judgment, the pleadings are relevant solely to delimit the scope of the issues. (*Sadlier v. Superior Court* (1986) 184 Cal.App.3d 1050, 1055.) A party cannot rely on her own pleadings to demonstrate a triable issue of fact. (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181.) Our concern is not with the sufficiency of the pleadings, but whether there are evidentiary disputes that require resolution through the process of a trial. (*Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596.)

Appellant contends (1) the conclusion in *Waltz I* that the allegations of the complaint were sufficient to show that First California owed her a duty of care is law of the case, and (2) no evidence was presented on the motion for summary judgment to warrant deviation from this rule. We disagree.

Under the law of the case doctrine, “[t]he decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.” (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 895, p. 928.) However, “the doctrine will not apply where there is no *substantial identity of facts*.” (9 Witkin, *supra*, § 908 at p. 943, emphasis in original.)

Waltz I assumed the truth of the allegations of the complaint. As we will point out, the motion for summary judgment presents a substantially different factual scenario. Accordingly, law of the case is inapplicable.

II

Duty

A

Appellant is seeking to recover from First California for professional negligence, which, she alleges, injured her economic interests. The record shows that, throughout the affair, appellant had no relationship with First California. Appellant conceded that First California never made any statements or representations to her. In fact, at the time she took the property back from Boswell, she was not aware of any involvement of First California in the matter.

Under these circumstances, it becomes particularly appropriate to focus, as did the trial court, on the threshold element of a duty of care because “[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law.” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58.)

Duty is a question of law for the court to determine on a case-by-case basis. (*Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 778.) Duty is the expression of those considerations of policy that lead the court to say that the particular plaintiff is entitled to protection from the particular act or omission alleged. (*Ibid.*; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1498.) The factors to consider include the foreseeability of harm to the plaintiff; the degree of certainty the plaintiff suffered injury; the closeness of the connection between the defendant’s

conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and the availability, cost and prevalence of insurance for the risk involved. (*Hernandez v. City of Pomona, supra*, at p. 1498.) "Following these principles, recovery for negligent interference with prospective economic advantage will be limited to instances where the risk of harm is foreseeable and is closely connected with the defendant's conduct, where damages are not wholly speculative and the injury is not part of the plaintiff's ordinary business risk." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 808.)

B

In addressing the legal question of duty, it is essential to consider the particular role or undertaking of the alleged tortfeasor in the transaction that gave rise to the claimed injury. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 398; *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650-651.)

Waltz I accepted, for purposes of judgment on the pleadings, the truth of appellant's allegations concerning First California's role in the events. Therefore, *Waltz I* noted "appellant alleges that [First California] held itself out as an expert in financial consulting, municipal financing, and underwriting, and that [it] was hired to provide advice, oversight, and supervision in the use of Mello-Roos financing, and to participate in structuring and underwriting a bond offering." (*Waltz I, supra*, p. 14.) She

alleged that First California “presented information with respect to the viability of the proposed bond issuance and special tax that was misleading and that failed to disclose all relevant facts and risk factors.” (*Id.* at p. 5.) And she asserted “[p]roperty owners relied upon this misinformation in going forward with and voting to approve the Mello-Roos Act bond proposal.” (*Id.* at p. 6.)

However, the evidence presented on motion for summary judgment established that First California’s role in the matter was not near as pervasive as appellant alleged in her complaint. The idea of using Mello-Roos financing arose when the adopted specific plan established that infrastructure improvements would be required before development would be permitted. The property could not be developed until the infrastructure improvements were completed, and Boswell concluded that a Mello-Roos bond issue would be the only way to accomplish the infrastructure improvements. The developers proposed the use of Mello-Roos financing, and at that point First California was not involved at all. In going forward with the proposed bond issuance, the city utilized its own employees and the assistance of the developers, and it hired a number of independent consultants, including contractors and engineers, an environmental consultant, bond counsel, disclosure counsel, a bond trustee and fiscal agent, and an appraiser. All of the witnesses testified First California’s only role in the matter was that of underwriter for the bond offering.¹

¹ The Government Code dictates there be separation between an underwriter and certain other participants in a bond offering.

In her opening brief, appellant asserts that First California "assembled a team of consultants that worked on a number of these Mello-Roos offerings, including appraisers, bond counsel and others" and that it "brought its team of consultants to the Wheatland offering." But the record fails to demonstrate that the various contractors and consultants who assisted the city were part of a team or were otherwise financially associated with First California.²

Thus, bond counsel--who is expected to render a written legal opinion with respect to the validity of the bonds--is legally prohibited from also serving as counsel to the underwriter or other initial purchaser of the bonds. (Gov. Code, §§ 53590, subd. (a); 53593.) A financial advisory relationship arises when an investment firm or other person agrees to provide financial advisory or financial consulting services to an issuer with respect to a new issue of bonds. (Gov. Code, § 53590, subd. (c).) Such a relationship does not arise just because an investment firm agrees to serve as underwriter. (*Ibid.*) When an issuer enters into a financial advisory relationship, the relationship must be evidenced by a written document setting forth the basis of compensation for the services, which must be some basis other than a percentage of the amount of the bonds to be sold. (Gov. Code, § 53592.) When a financial advisory relationship is established, the investment firm with such a relationship to the issuer is legally prohibited from participating as underwriter, except in circumstances not relevant here. (Gov. Code, § 53591.) These legal prohibitions would not prevent an underwriter from unlawfully entering into a financial advisory relationship with the issuer or into a legal services agreement with bond counsel. However, First California's representatives testified that it did not do so. Other witnesses described First California's role solely as that of underwriter. In the absence of some evidence to the contrary, we cannot assume that First California served in a financial advisory or financial consulting capacity or formed an improper relationship with bond counsel.

² The only evidence in the record of an association between First California and the independent consultants was with

The record also does not establish that the property owners in the area relied on any representations of First California in voting to go forward with the bond issue. Rather, representatives of First California testified that it did not undertake to provide financial planning or other advice with respect to the wisdom or viability of utilizing Mello-Roos financing. Appellant does not dispute that First California had no agreement to provide advice to any landowner. Boswell, the only property owner whose testimony is in the record, said that he had only infrequent contact with First California. He said that at the time the real estate market was so hyperactive he was confident he would be able to sell the property when he got a subdivision map filed and was not really concerned about feasibility studies and the like. The record contains documents and correspondence that Boswell prepared for prospective investors and other property owners. Therein, Boswell

respect to the appraiser, William McKay. Charles Terranella, First California's employee who handled the Wheatland bond offering, testified that coemployee Derrick Dumont recommended McKay to him and that he suggested the city talk to McKay. Although Terranella did not know at the time, it appears McKay had served as appraiser on other bond offerings underwritten by First California. Terranella subsequently participated with the city attorney, Robert Joehnck, in interviewing McKay before the city hired him. Terranella testified that customarily he does not work with the appraiser on bond issues and that other than his initial meeting with McKay he could not recall doing anything with him. Joehnck testified that he could not recall who hired McKay and paid his fee. His best recollection was that the city did not retain McKay and that it could have been First California or Boswell that did so. He believed McKay was ultimately paid out of the bond proceeds. Boswell testified that he could not recall who hired McKay, although he either alone or with other developers may have paid him.

explained the improvements and services to be financed through the Mello-Roos Act and set forth the maximum assessments that could be imposed against various properties. The documents do not contain any recommendations or advice purportedly obtained from First California. There is nothing else in the record that would suggest property owners received and relied upon advice from First California in voting to go forward with Mello-Roos financing.³

The record also reflects that appellant's claimed injury did not occur as she alleged. Her complaint asserts that the bond issue was substantially undersubscribed, the city went forward with insufficient funds, the projects were not completed, and all future development projects in the city have been jeopardized. In fact,

³ *Waltz I* rejected the claim that appellant should be required to establish that she relied upon information and advice from First California. (*Waltz I*, pp. 9-10.) In the election to determine whether to go forward with Mello-Roos financing, the landowners--including Boswell--were permitted to vote; but appellant, as a secured creditor, was not. Since she had no choice in the matter, *Waltz I* concluded she was not required to establish personal reliance on First California's conduct. (*Ibid.*) Reliance, however, is not irrelevant. Where an action is based upon alleged misadvice or misrepresentation, reliance is an essential element of the cause of action. (*Ostayan v. Serrano Reconveyance Co.* (2000) 77 Cal.App.4th 1411, 1418; *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818.) Appellant's complaint alleges First California's misadvice and misrepresentations induced the landowners to act to her detriment; but on the motion for summary judgment, she fails to present any evidence in support of that claim. Proof that the landowners relied upon First California's advice and representations is essential to her cause of action.

the record reflects that the bond issue was fully subscribed,⁴ the infrastructure projects necessary for development were completed, and the development projects could have gone forward. It was, however, at this time that the national recession and decline of the California real estate market intervened and the development projects failed.

Additional facts are set forth in the record. Appellant acquired the property in 1978. She paid \$30,000 and assumed responsibility for remaining payments on some bonds. The land was vacant, and appellant's only intent was to hold the property for a future sale to a developer. She sold the property to Boswell for \$533,100 in 1989. She received almost \$107,000 down and took back a secured promissory note for \$426,480. A few years later, when Boswell's development plan failed, he brought the taxes and assessments current and deeded the property back to appellant. Appellant did not pay the next annual Mello-Roos assessment, and the city foreclosed on the property. But no one bid on the property at the foreclosure sale, and appellant remained in possession of it. She was subsequently able to sell the property for \$420,000.

⁴ The city originally intended to issue bonds in amount of \$2,980,000, but reduced that sum to \$2,075,000 when the successful bid on the expansion of the sewage treatment plant was substantially lower than anticipated. When the bonds were issued, First California--as underwriter--purchased them all for \$2,009,129.71 and then sold them to the public. The discount at which First California purchased the bonds, \$65,870.29, was its compensation.

In opposing summary judgment, appellant presented various documents, including the declaration of an expert, to establish that the Security Exchange Commission (SEC) imposes certain duties on an underwriter of municipal bonds. An underwriter must obtain and provide the issuer's disclosure documents to prospective bond purchasers. In the SEC's view, by offering bonds for sale to investors, an underwriter makes an implied representation that the underwriter has a reasonable basis for belief in the truthfulness and completeness of the key representations made in the disclosure documents of the issuer. Accordingly, the underwriter must review, in a professional manner, the accuracy of the offering statements with which it is associated.

Appellant's presentation related entirely to the relationship between an underwriter and investors who purchase municipal securities and to the underwriter's duties toward those investors. An underwriter is in privity with investors to whom it markets municipal securities, and misrepresentations--express or implied--would tend to establish a traditional cause of action.

It does not follow that an underwriter has a duty in tort to third parties with whom it has no relationship and to whom it makes no representations. That is the question we must answer here because, as we have noted, recognition of a duty to prevent purely economic loss to third parties is the exception, not the rule, in negligence law. (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 58.)

When a party suffers physical injury to person or property, foreseeability of harm may be the most significant consideration in the duty equation. (*Bily v. Arthur Young & Co.*, *supra*, 3 Cal.4th at p. 398; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573, fn. 6.) However, where the plaintiff complains of nonphysical harm, such as an alleged injury to economic expectations, foreseeability alone is insufficient to support the imposition of a duty. (*Bily v. Arthur Young & Co.*, *supra*, 3 Cal.4th at pp. 398-399.) Policy factors may intervene to require that duty be delimited. (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 446.) This is particularly true where the claimed injury is intangible, the connection between the defendant's conduct and the injury is tenuous, and imposition of duty would impose liability out of proportion to alleged fault. (*Bily v. Arthur Young & Co.*, *supra*, 3 Cal.4th at pp. 399-402; *Thing v. La Chusa* (1989) 48 Cal.3d 644, 667-668; *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 297-299.)

Consequently, where, as here, a party claims injury to economic expectations, the question of foreseeability of harm "simply begs the question: What harm?" (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 646.)

The trial court found that whether appellant suffered injury was speculative and dubious. We agree.

The record establishes that the year 1989 was a time of heady expectations among land developers. Boswell testified there were "big hitters" wanting to buy everything in Wheatland. He would describe the situation as a frenzy, and said people were "just

buying with both fists." Undoubtedly, these heady expectations were what enabled appellant to obtain from Boswell a price of \$533,100 for property she bought for \$30,000 just 11 years earlier. As part of the purchase price, appellant took a secured note for \$426,480 and, to that extent, she was financing Boswell's development expectations.

It is a general rule of investment that greater potential gains are associated with greater risk of failure. Appellant's expectations were intimately tied to Boswell's expectations, and in that respect, the failure of Boswell's expectations was part of appellant's ordinary investment risk, which is generally not compensable in tort. (*J'Aire Corp. v. Gregory, supra*, 24 Cal.3d at p. 808.)

It was clear to everyone that the only thing that caused the value of the property to rise so high was the prospect of development. Boswell testified he would have no use for the land if it could not be subdivided. When the city's specific plan was under preparation, and when it was adopted, it became clear that there would have to be infrastructure improvements before the land could be developed. Boswell concluded Mello-Roos financing was the only way to accomplish the infrastructure improvements.

If, as appellant seems to suggest, First California had refused to go forward with underwriting the bond issuance or had otherwise successfully advised against the bond, it appears reasonably certain that development expectations for the area would have collapsed and Boswell inevitably would have defaulted on his obligation to appellant.

The bond issue did go forward, and the infrastructure improvements necessary for development were completed. Boswell went forward with his plans and reached the point that he was actively marketing the property. Initially, he received lucrative offers for the property. However, at that point "the market completely fell apart." When the market collapsed, offers were withdrawn and Boswell's development plans failed. The market collapse was beyond the control of anyone, including First California. Yet everyone, including appellant, recognized that the collapse of the real estate market was the ultimate reason Boswell's development plans failed.⁵

When appellant received the property back from Boswell, it was burdened with responsibility for future Mello-Roos assessments. Appellant did not pay the next annual assessment, and the city foreclosed. But fortuitous circumstances intervened. No bidders came to the foreclosure sale, and appellant was left in possession of the property. She subsequently was able to sell the property for \$420,000. Appellant has made no claim that she was forced to actually pay Mello-Roos assessments after receiving the property

⁵ In her deposition, appellant said that Wheatland did not cooperate sufficiently with Boswell in accomplishing his project and that, by the time the city did approve his plans, the market was falling. She said: "Had Wheatland city cooperated with what he needed to go forward or what the developer needed, he -- it wouldn't have been this way." In that respect, appellant blamed Wheatland for the failure of Boswell's project.

back from Boswell.⁶ Yet, doubtlessly the infrastructure improvements that were completed with the proceeds of the bond issue, which made the property developable, contributed to her ability to successfully market the property.

It appears that appellant's chief complaints are that (1) she did not obtain the benefit of Boswell's satisfaction of the obligation he owed to her, and (2) when she received the property back from Boswell, it was burdened with Mello-Roos assessments. But with the benefit of hindsight, it would seem that Boswell's expectations, including the expectation that he would be able to satisfy his obligation to appellant, were doomed. The collapse of the real estate market, which was beyond anyone's control, saw to that. And, albeit through fortuitous circumstances, appellant did not pay the Mello-Roos assessments, nonetheless did not lose the property, and was later able to make a lucrative sale of it. It is likely many people lost money in what became a development fiasco. Boswell, for instance, had hundreds of thousands of dollars invested at the time he walked away. On the other hand, it appears that, while appellant suffered some delay in ultimately selling the property, she was able to emerge relatively unscathed.

Perhaps even more significant to the duty question is the matter of the closeness of the connection between First California's

⁶ First California included the fact that appellant had sold the property for \$420,000 in its statement of undisputed facts. Appellant's sole response was the assertion that part of the purchase price--\$370,000--was in the form of a promissory note and, thus, in her view, was speculative.

conduct and the alleged injury. Appellant's complaint asserted that if First California had used reasonable care and skill in advising the city and property owners that the proposed Mello-Roos project was not financially feasible, they would not have gone forward with the project. But she fails to suggest how that would have avoided the collapse of the real estate market and, with it, Boswell's development expectations. If the city and the landowners had not gone forward with the Mello-Roos project, then the property would not have been subject to Mello-Roos assessments when appellant received it back from Boswell. Since appellant was not ultimately forced to pay the assessments, and was able to retain and sell the property, it is difficult to understand how First California's conduct was injurious to her.

We also must consider the extent of the burden on First California and the consequences to the community of imposing a duty of care with resulting liability for breach. In doing so, we consider First California's role as underwriter as established by the record, rather than as financial adviser as alleged by appellant but not supported by any evidence.

Appellant's submissions establish that the SEC imposes upon an underwriter the duty to review disclosure documents in a professional manner, so it can have a reasonable basis for belief in the truthfulness and completeness of the key representations made in those documents. The extent to which an underwriter must investigate is dictated by the particular circumstances of the offering. The SEC does not impose upon an underwriter a duty to independently investigate and vouch for the wisdom of a Mello-Roos

bond offering beyond the representations in the disclosure documents. Nor does it require an underwriter to guarantee the success of the Mello-Roos project or the expectations of third parties who may be interested in the project. Rather, it requires an underwriter to review disclosure documents to the extent that is necessary to develop a reasonable basis for recommending securities to buyers of those securities.

Appellant would impose duties and liabilities upon an underwriter far in excess of those imposed by the SEC. Under appellant's view of the matter, an underwriter could be subjected to suit for anyone's failed expectations with respect to the use of Mello-Roos financing. Moreover, when the voters or landowners of a particular area vote for a bond issue and related assessments, any dissenting voters could sue the underwriter claiming that its representations caused their land to become subject to assessment. Under appellant's view of the matter, an underwriter would become responsible not only for reviewing the accuracy and completeness of disclosure documents, but for ensuring the success of the project and for third party expectations based thereon.

Such a broad expansion of duty, with resulting liability, could have significant adverse consequences to the community. The expansive duties and corresponding liability that appellant would impose upon underwriters would likely cause many investment firms to refuse to underwrite Mello-Roos bond offerings. Those that do underwrite offerings would doubtlessly demand greater compensation to account for the significantly greater risk undertaken. (See *Bily v. Arthur Young & Co.*, *supra*, 3 Cal.4th

at pp. 404-405.) This would tend to reduce or even eliminate the financing flexibility the Mello-Roos Act was intended to give to local governments. (Gov. Code, § 53311.5.)

We also perceive no necessity for imposing expanded duties upon underwriters. The duties appellant would impose would be in large part duplicative. Thus, an underwriter would be required to independently investigate, assess, and essentially vouch for the opinions of other professionals, such as bond counsel and those with whom the issuer has a financial advisory relationship.

In the absence of expanded liability, an underwriter would not be free of responsibility for the negligent performance of its underwriting duties. State and federal regulators have authority to take action against an underwriter for professional negligence; in cases of willful failure criminal penalties may apply; and the purchasers of bonds who suffer loss due to an underwriter's failures have a right of action. (See *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1100-1104.) These are adequate means of dissuading underwriters from ignoring their professional responsibilities.

E

In light of the record presented on the motion for summary judgment and all of the factors relevant to the question of duty, we agree with the trial court that First California, as underwriter of the Wheatland Mello-Roos bond offering, did not owe a duty to appellant to protect her against the failure of her investment expectations. As we have explained, First California's role in the offering was limited to that of underwriter. The connection between First California's alleged professional failures and

appellant's alleged injury is tenuous. Indeed, it is speculative whether appellant actually suffered injury. The injury that she alleges was to her investment expectations, which generally is not compensable in tort. And the broad expansion of duty, with resulting liability, appellant urges is unnecessary and would carry with it the potential of significant detriment to the financing flexibility that the Legislature intended to establish through the Mello-Roos Act.

Accordingly, we conclude that the trial court properly entered summary judgment in favor of First California.

DISPOSITION

The judgment is affirmed.

_____, SCOTLAND, P.J.

We concur:

_____, DAVIS, J.

_____, KOLKEY, J.